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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

Nos. 73-1966 and 73-1971

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL, *Appellants*

v.

STUDENTS CHALLENGING REGULATORY AGENCY PROCEDURES (S.C.R.A.P.) ET AL, *Appellees*

On Appeal from the United States District Court for the District of Columbia

OPPOSITION OF APPELLEES NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC. (NARI), COMMERCIAL METALS CO., I. V. SUTPHIN CO. AND FRANKEL BROS. & CO., INC. TO "SUGGESTION OF MOOTNESS" FILED BY COUNSEL FOR EDF ET AL.

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Appellees NARI, Commercial Metals Co. of Dallas, Texas, I. V. Sutphin Co. of Cincinnati, Ohio and Frankel Bros. & Co., Inc. of Rochester, New York hereby oppose the "Suggestion of Mootness" filed herein on April 8, 1975, approximately two weeks after oral

argument and submission of these appeals, by counsel for the Environmental Defense Fund (EDF), and in support of this opposition, these appellees respectfully state.

I.

THIS CASE, WHICH RAISES IMPORTANT THRESHOLD JURISDICTIONAL ISSUES AND ISSUES OF GREAT CONTINUING INTEREST UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT AND OTHER RELATED FEDERAL STATUTES, IS IN NO SENSE MOOT.

In *Southern Pacific Terminal Company* v. *Interstate Commerce Commission,* 219 U.S. 498 (1911), this Court ruled that even in a case where a challenged order of the Interstate Commerce Commission has actually *expired*, a pending litigation challenging the legality of that order, as rendered by the Commission, is not moot. At page 515, this Court stated:

> "In the case at bar the order of the Commission may to some extent (the exact extent it is unnecessary to define) be the basis of further proceedings. But there is a broader consideration. The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated by short term orders, capable of repetition, yet evading review, and at one time the Government and at another time the carriers have their rights determined by the Commission without a chance of redress."

See also: *United States* v. *Trans-Missouri Freight Association,* 166 U.S. 290, 308; *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.,* 304 U.S. 257, 58 S.Ct. 863 (1938); *Eagles* v. *United States,* 329 U.S. 304, 67 S.Ct. 313 (1946).

In the instant case, the challenged orders of the Interstate Commerce Commission are plainly *continuing orders;* they have in *no* manner *expired.* And, under the judgment of the district court, they will be the subject of further proceedings upon remand to the Commission, if this Court affirms or dismisses the pending appeals for lack of direct appellate jurisdiction; or if this Court fashions a final judgment of its own which remands the case to the Commission for further proceedings.

Insofar as shippers of recyclable commodities represented by NARI herein are concerned, the *continuing,* oppressive nature of the challenged orders is clear. Since the summer of 1973, they have been bearing the entire force of the *Ex Parte No. 281* rate increase for the transportation of recyclable commodities licensed by the Commission's orders, challenged herein as patently illegal under the National Environmental Policy Act (NEPA) and related federal statutes.[1] Those increased rates have forced these shippers to pay an additional $9 million per year in transportation charges, and those huge additional charges will continue to be collected each year in the future unless this Court rules that the Commission's orders were violative of NEPA and that same cannot form a lawful basis for continuing collection.

How, therefore, can anyone seriously contend that a case of this nature is moot? The pending "Suggestion of Mootness" does not even attempt to consider the last mentioned facts. Instead, it simply asserts, in the

[1] The Solid Waste Disposal Act, 42 U.S.C. § 3251 et seq., as amended by The Resource Recovery Act, 42 U.S.C. § 3253a. The Rail Reorganization Act of 1973, Public Law 93-236, Section 603.

vaguest possible manner, that something the Assistant Solicitor General said, or may have intended to say, during oral argument before this Court on March 26, 1975 somehow raises a *new question* regarding the type of evidence to be considered by the Commission in the event this case is ultimately remanded to the Commission for reconsideration. We respectfully suggest that, at best, what the Assistant Solicitor General said, or may have meant to say in that regard, during argument, in no sense renders this entire litigation moot. On the contrary, as now discussed by counsel for EDF in his pending "Suggestion", the Assistant Solicitor General's remarks merely seem to add possibly another new question to be considered and resolved by this Court—i.e., in the event this case is remanded to the Commission for further proceedings as directed by the District Court, what type of evidence should the Commission consider and with reference to what time frame.

But patently, one thing is crystal clear. Nothing the Assistant Solicitor General said and nothing he may have meant to imply, expunged the challenged orders of the Commission in this case or cancelled the challenged rate increase licensed by the Commission, pursuant to which the recycling industry represented by appellee NARI herein is being compelled, and will continue to be compelled to pay $9 million a year in additional, unlawful freight rates.

Moreover, the Court will surely recall that the two direct appeals in this case raise serious questions regarding *this Court's jurisdiction* to hear and determine at this time the other important questions raised *"on the merits"* under the National Environmental Policy Act (NEPA) and the other related federal statutes mentioned above. (*Public Service Commission of Mis-*

souri v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 59 S.Ct. 480, 83 L.Ed. 608 (1939); *Gunn* v. *University Committee To End The War*, 399 U.S. 383, 391, 90 S.Ct. 2013 (1970); *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed. 2d 806 (1970)). There is absolutely nothing in the pending "Suggestion" which even contends that this basic threshold *jurisdictional* issue has been rendered moot in any respect.

Indeed, if this Court rules it lacks jurisdiction to entertain these two direct appeals, especially in light of the provisions of Public Law 93-584 which recently became effective, then seemingly this Court should not even address the pending "Suggestion of Mootness" which plainly is directed, at best, to the *"merits"* of the two pending appeals. In this connection, when EDF's view of this case was apparently in better focus, EDF stated in its brief, at page 29:

> "But appellants . . . are not properly before this Court under 28 U.S.C. § 1253."

Thus, as a matter of law, this Court must still determine whether the two direct appeals in this case should be completely dismissed for lack of jurisdiction under 28 U.S.C. § 1253 (*Public Service Commission* v. *Brashear*, supra; *Hutcherson* v. *Lehtin*, 399 U.S. 522, 90 S.Ct. 2238 (1969); *Mitchell* v. *Donovan*, 398 U.S. 427, 90 S.Ct. 1763, 26 L.Ed.2d 378 (1970)); or whether, as a matter of judicial discretion, they should be routed, via the district court, back to the United States Court of Appeals for the District of Columbia Circuit, where plainly they should have been filed originally, and where today all such appeals *must* be filed under Public Law 93-584.

Furthermore, the Court will also certainly recall that the railroads have repeatedly argued in this case that the district court, in turn, lacked *jurisdiction* to review the Commission's general revenue orders in *Ex Parte No. 281* (Railroad's brief, pg. 21 et seq.); that appellees have simultaneously, unanimously taken an absolutely contrary position and they contend that the district court did possess jurisdiction to review the Commission's record of compliance or non-compliance with the National Environmental Policy Act (EDF brief, pg. 31 et seq.; NARI brief, pg. 24 et seq.; ISIS brief, pg. 10 et seq.); while the Government has advised the Court, both in its briefs and during oral argument, that, in its judgment, the district court was correct to entertain this case for review under NEPA (Government's reply brief, pgs. 3, 4). Again, there is nothing in the pending "Suggestion" which renders this issue moot. In fact, it would be rather astounding if counsel for EDF should suddenly espouse any such position in light of the following statement in his earlier brief herein (at page 33):

> "This foreclosure of review [asserted by the railroads] would preclude environmental groups such as SCRAP and EDF *et al.* from litigating the issue which has practical consequences for them, their members and the environment, namely, the asserted *cumulative* environmental impact of a percentage rate increase which includes rates on recyclables."

Finally, of course, this case involves other extremely important questions *"on the merits"* under the National Environmental Policy Act (42 U.S.C. § 4321 et seq.) and the other related federal statutes mentioned above, which by no stretch of the imagination

are presently moot. Essentially, these questions are as follows:

(i) Whether the Interstate Commerce Commission, which has an established record of adamantly refusing to comply with the plain requirements of Section 102(2)(C) of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C), may lawfully ignore those statutory directives by arbitrarily failing and refusing to prepare any acceptable or sustainable Environmental Impact Statement *prior* to the rendition of its *final* decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board, unreasonable, discriminatory, pyramidic increase in transportation rates for recyclable wastepaper, textiles and scrap metal (*NARI Brief,* pg. 3).

(ii) Whether the Interstate Commerce Commission may lawfully defeat and circumvent the plain requirements of Section 102(2)(C) of NEPA by waiting until several months *after* it has already rendered a final decision and order in a nationwide freight rate increase proceeding, wherein it expressly approved another across-the-board increase in transportation rates for recyclable commodities, to prepare *for the first time,* a *post-mortem* Environmental Impact Statement, the sole purpose of which was to rationalize, *nunc pro tunc,* the rate increase theretofore approved seven months before (NARI Brief, pg. 3).

(iii) Whether the Interstate Commerce Commission, which is obliged by Section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to hold meaningful hearings to determine the *"lawfulness"* of proposed rate increases, may properly issue a final order approving such rate increases and only *thereafter* consider the *"lawfulness"* of such approved increases under the National Environmental Policy Act in *post-decision* proceed-

ings that flatly deny the right to any hearing on the *new issues* thus belatedly raised (NARI Brief, pg. 3).

(iv) Whether in a case of this nature where the Commission has constantly exhibited hostility to the requirements of the National Environmental Policy Act, the district court properly exercised its judicial power to review not only the *form* of the Commission's alleged, belated compliance with NEPA, but the *substance* of that alleged compliance as well; and where the court found the Commission's alleged compliance to be seriously inadequate or capricious, was it proper for the court to remand the case to the Commission for further administrative proceedings consistent with the court's decree (*NARI Brief,* pg. 4).

The resolution of these vitally important questions under NEPA is still critically necessary, not only insofar as the instant case is concerned, but also because, until they are resolved, they will continue to arise in case after case in the future involving proceedings before the Interstate Commerce Commission and other federal agencies, and for that reason also, they plainly are not moot. (See *Southern Pacific Terminal Company* v. *Interstate Commerce Commission, supra*).

II.

IT IS ABSOLUTELY ERRONEOUS AND IMPROPER FOR EDF TO SUGGEST, WITHOUT ANY SUPPORT IN THE RECORD BEFORE THE COURT, THAT THE VERY LIMITED RECENT ACTIONS TAKEN BY THE COMMISSION IN EX PARTE 310 HAVE "RADICALLY CHANGED ... THE RELATIONSHIP BETWEEN RATES FOR SCRAP AND PRIMARY MATERIALS."

The wholly specious, baseless statements made at pages 2-4 of EDF's "Suggestion of Mootness" regarding the overall effect of the Commission's recent, *ex-*

tremely limited actions in *Ex Parte 310* are grossly improper and they should be stricken for lack of any support whatsoever in the factual record before this Court, and because they are plainly false and inaccurate.

As demonstrated in NARI's main brief herein,[2] on the basis of the record actually before this Court—

> (i) in 1959, virgin pulpwood was carried by the nation's railroads at average national freight rates 13.9¢ per cwt. lower than those charged for the transportation of competing wastepaper.
>
> (ii) By 1971, as a result of % rate increases granted by the Commission in a series of *Ex Parte* proceedings, that rate advantage had grown to 18.6¢ per cwt. in favor of pulp.
>
> (iii) Similarly, by 1971, virgin non-ferrous ores enjoyed a 17.7¢ per cwt. advantage over competing non-ferrous metal scrap, and that advantage had grown from a 13.3¢ per cwt. advantage in 1959, as a result of successive *Ex Parte* % increases allowed by the Commission.

Since 1971, further distortions of these rate relationships were fashioned by the Commission in *Ex Parte 281* (2.5% surcharge, plus 3%), *Ex Parte 295, Sub 1* (3%), and *Ex Parte 299* (2.8%). In many of these *Ex Parte* proceedings, the railroads actually exempted some of the competing virgin commodities involved from any increase whatsoever, or they favored them with rate holddowns.

Thus, merely because the Commission finally recently exempted wastepaper, textile wastes and nonferrous metal scrap from the 7% increase involved in

[2] At pages 6, 7.

Ex Parte 310, this case involving *Ex Parte 281* was in no sense or manner thereby rendered moot. First of all, some of the competing virgin commodities involved were again exempted by the railroads from any increase in *Ex Parte 310.* But, irrespective of that, the Commission's exclusion of recyclables from the 7% increase did not nearly serve to eliminate the historic rate distortions mentioned above which still inexplicably favor the high-priced virgin commodities and penalize the low-priced competing recyclables. Those gross rate distortions are largely still in effect, so irrespective of what the Commission did in *Ex Parte 310* in 1975, its actions in 1972 and 1973 in *Ex Parte 281* are still anything but moot, and they continue to cry out for remedial relief in this case.

CONCLUSION

The pending "Suggestion of Mootness" should be rejected. The Court should proceed to pass first on the threshold *jurisdictional* issue; and if it then decides jurisdiction lies, the Court should proceed with a decision on the merits under the National Environmental Policy Act and other related federal statutes. If, for any reason, the Court intends seriously to consider the said "Suggestion of Mootness" then appellees NARI, et al. hereby move for rehearing and reargument with reference to that issue not discussed during oral argument.

Respectfully submitted:

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